

SpecFUEL™ Regulatory Analysis

Background:

SpecFUEL is a high-BTU value fuel product that is processed from post-recycled consumer, commercial and industrial materials extracted from the municipal waste stream. SpecFUEL is carefully engineered to include only acceptable fuel feedstock materials, resulting in a greater than 50% rate of diversion from landfilling. SpecFUEL has a meaningful market value, and provides a viable alternative for coal, petcoke and biomass in cement kilns, power plants and other energy-recovery combustion units. SpecFUEL meets the rigorous requirements for processing, and each of the legitimacy criteria, established by the Non-Hazardous Secondary Materials Rule ("NHSM Rule") at 40 CFR Part 241, 54 Fed. Reg. 15456 (March 21, 2011). Pursuant to the NHSM Rule, SpecFUEL is not a solid waste when combusted. Because SpecFUEL is not a solid waste, its combustion is not regulated pursuant to Section 129 of the Clean Air Act ("CAA"), 42 U.S.C. §7429 ("Section 129"). Instead, pursuant to the NHSM Rule, the use of SpecFUEL in combustion units will be regulated pursuant to applicable standards promulgated under Section 112 of the CAA, 42 U.S.C. §7412.

The language of Section 129 does not prohibit a determination under the NHSM Rule that SpecFUEL is a legitimate fuel, rather than a solid waste.

1. Section 129 requires EPA to set standards for categories of solid waste combustion. Section 129 applies generally to EPA's authority to regulate "solid waste incineration units" and defines such units broadly in Section 129(g)(1) to include (in pertinent part) "a distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels and motels)."¹ 42 U.S.C. § 7429(g)(1). The broad definition of "solid waste incineration unit" in Section 129(g)(1) encompasses different types and sources of solid waste, but is clear that only a unit that combusts "solid waste" would be covered by Section 129 standards.
2. Section 129(a) identifies specific categories of solid waste combustion for which EPA is required to establish standards, including municipal waste, hospital waste, medical waste, commercial and industrial waste, and other categories of solid waste incineration units. By the very structure and purpose of Section 129, these categories of combustion **units would only be subject to Section 129 standards if they are first determined to combust "solid waste"** and as such meet the definition of "solid waste incineration unit." See Davis County Solid Waste Management v. EPA, 101 F.3d 1395, 1398-99 (D.C. Cir. 1996) (explaining that Section 129 "directs the EPA to establish emission standards for *solid waste* incineration units" and that Section 129 further defines several "*categories of solid waste* incineration units," including municipal waste combustors) (emphasis added). See also Northeast Maryland Waste Disposal Authority v. EPA, 358 F.3d 936, 939-40 (D.C. Cir. 2004) (per curiam) (same).

¹ The definition of "solid waste incineration unit" includes four express exemptions which are not relevant for this purpose: (1) units requiring a permit under 42 U.S.C. §6925; (2) material recovery facilities which combust waste for the primary purpose of recovering metals; (3) small power production facilities or cogeneration facilities that combust homogenous waste for the production of electric energy or steam; and (4) qualifying air curtain incinerators that burn only wood wastes, yard wastes and clean lumber.

3. The inclusion of the definition of “municipal waste” in section 129(g)(5) does not alter the overall construct of Section 129. Instead, it merely defines one category of “solid waste” that is covered pursuant to Section 129 (and establishes an exemption from Section 129 standards for units combusting a fuel feed stream composed of less than 30% municipal waste in the aggregate). See Davis County, 101 F.3d at 1398 n. 4 (explaining that, although Section 129 refers to “‘municipal waste’ as opposed to MSW [municipal solid waste] . . . it is apparent from the fact that Section 129 addresses solid waste incineration units that the type of municipal waste at issue is MSW”). Likewise, EPA’s promulgated regulations governing municipal waste combustion refer to and define “municipal solid waste” as a type of solid waste. See, e.g., 40 CFR § Part 60, Subpart Eb, defining “municipal solid waste or municipal-type solid waste” at 40 CFR §60.51b. See also USEPA, RCRA Orientation Manual 2011, at II-2 (“**Municipal solid waste is a subset of solid waste.**”)
4. Notwithstanding the CAA’s identification within Section 129 of the types of solid waste incineration units for which EPA is required to establish standards, including units that combust municipal waste, **Section 129 does not define “solid waste.”** Instead, **Section 129(g)(6) provides** that the term “solid waste” shall have the meaning established by the Administrator under the Solid Waste Disposal Act (now consolidated under the Resource Conservation and Recovery Act (“RCRA”) at 42 U.S.C. §6901 et seq.).

This was echoed by EPA in its Responses to Comments Document for the NHSM Rule. **Congress specifically directed that “solid waste” have the meaning established by the Administrator under RCRA.**²

EPA’s NHSM Rule was promulgated precisely for the purpose of defining “solid waste.”

The NHSM Rule allows combustion units to be properly classified as being regulated either under CAA section 112 categorical standards for fuel burning units, or under CAA Section 129 standards for “solid waste incineration units.” The rulemaking was prompted by the decision of the D.C. Circuit in NRDC v. EPA, 489 F.3d 1250 (D.C. Cir. 2007), in which the Court vacated certain definitions contained in EPA’s standards for Commercial and Industrial Solid Waste Incineration Units (“CISWI”),³ because such definitions allowed the combustion of solid waste for energy recovery to be regulated pursuant to Section 112 of the CAA, rather than Section 129.

In an excerpt from the NHSM Rule preamble, EPA states the following:

² EPA Responses to Comments Document for the NHSM Rule, February 2011, EPA Docket ID. No. EPA-HQ-RCRA-2008-0329, EPA Response to Comment [3a-A1-5]

³ Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units, 70 Fed.Reg. 55,568 (Sept. 22, 2005) (CISWI Definitions Rule), *amending* Standards of Performance for New Stationary Sources and Emissions Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units, 65 Fed.Reg. 75,338 (Dec. 1, 2000)

In responding to the Court's vacatur and remand of the CISWI Definitions Rule and the Boiler MACT Rule, EPA is establishing, under RCRA, which non-hazardous secondary materials are "solid waste." This is necessary because, under the Court's decision, any unit combusting any "solid waste" at all must be regulated as a "solid waste incineration unit," regardless of the function of the combustion device. If a non-hazardous secondary material (also referred to as a "secondary material" in this rulemaking) is not a "solid waste" under RCRA, then a unit combusting that material must be regulated pursuant to CAA section 112 if it is a source of HAP. Alternatively, if such secondary material is classified as a "solid waste" under RCRA, then a unit combusting the material must be regulated under CAA section 129, unless it is within the scope of one of the exclusions from the definition of "solid waste incineration unit" in section 129(g)(1) of the CAA. 76 Fed. Reg. at 15462.

In discussing the history of the definition of "solid waste" under RCRA, EPA notes in the NHSM Rule preamble that "EPA has not promulgated detailed regulations defining solid waste for purposes of the subtitle D (non-hazardous) programs." 76 Fed. Reg. at 15462. Further, EPA states that **the express purpose of the NHSM rulemaking is to determine the "procedures for identifying non-hazardous secondary materials that are solid waste under RCRA subtitle D** so that we can establish appropriate emission standards under CAA sections 112 and 129." *Id.* Finally, EPA makes it abundantly clear that its definition of "solid waste" through the NHSM Rule is fundamental and primary to the application of CAA Section 129 standards, and cannot be "trumped" by any language in Section 129. In responding to a commenter's concern that the NHSM Rule would allow the combustion of solid waste in contravention of Section 129, including with respect to NHSM derived from refuse, EPA states the following:

EPA is establishing a definition of non-hazardous solid waste, which, as specified by CAA section 129(g)(6), governs the meaning of "solid waste" under section 129. Because Congress specifically directed that "solid waste" have the meaning established by the Administrator under RCRA, instead of defining the term under RCRA, the CAA definition of "municipal waste" is not relevant to this action.

If any or all of the commenter's contentions are correct, section 129 would not provide that the term "solid waste" shall have the meaning promulgated by EPA under RCRA. There would simply be no reason for EPA to consider the RCRA definition, since section 129 would take care of the issue. Section 129(g)(6) would be meaningless.

NHSM Rule, Response to Comment [3a-A1-5]. Further, in responding specifically to concerns surrounding Refuse Derived Fuel ("RDF")⁴ identified in CAA Section 129, EPA states the following:

⁴ RDF is identified in Section 129 as a type of municipal waste, and its combustion is regulated under municipal waste combustor standards promulgated under Section 129. *See e.g.* 40 CFR Part 60, Subpart AAAAA, Standards of Performance for Small Municipal Waste Combustion Units for Which Construction is commenced After August 30, 1999 or for Which Modification or Reconstruction is Commenced After June 6, 2001. RDF is specifically defined under such standards as follows: *Refuse-derived fuel means a type of municipal solid waste produced by processing municipal solid waste through shredding and size classification. That includes all classes of refuse-derived fuel including two fuels: (1) Low density fluff refuse-derived fuel through densified refuse-derived fuel. (2) Pelletized refuse-derived fuel.* 40 CFR §60.1465.

